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**THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 01.12.2011  
Judgment delivered on: 23.12.2011

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**WP(C) 6066/2011**

SCHILLER HEALTHCARE INDIA PVT.  
LTD. & ANR.

..... PETITIONERS

Vs

UNION OF INDIA & ORS.

..... RESPONDENTS

**Advocates who appeared in this case:**

For the Petitioners: Mr S. Ganesh, Sr. Advocate with Ms Surekha Raman, Mr Gaurav Nair, Mr Varun Singh & Mr Anuj Sarma, Advocates.  
For the Respondents: Mr Jatan Singh, CGSC with Mr Prashant Ghai, Advocate for Respondent Nos. 1 and 2.  
Mr C.N. Sreekumar & Mr R.R. Chandran, Advocates for Respondent No. 3.

**CORAM :-**

**HON'BLE MR JUSTICE SANJAY KISHAN KAUL  
HON'BLE MR JUSTICE RAJIV SHAKDHER**

**RAJIV SHAKDHER, J**

1. The grievance of the petitioner is in a narrow compass. The petitioner is aggrieved by the fact that, the Global Tender Enquiry Document dated 07.07.2010 (hereinafter referred to as the 'Tender'), which had technical specifications stipulated therein, inter alia, in respect of products described in Schedule 10, 13 and 47 (qua which bids were invited) were altered by respondent no. 3, post pre-bid meeting dated 18.07.2011, to its detriment.

1.1 The specific products in issue, vis-à-vis which, detailed technical specifications are set out in schedules 10, 13 and 47; are briefly described as follows, in the Tender:

- (i) Defibrillator with external paddles and external pace maker.
- (ii) Ventilator-High End (I.C.U.).
- (iii) Defibrillator with external paddles, internal paddles and external pace makers.

1.2 Amongst numerous specifications adverted to, in the Schedules referred to above; what we are concerned with is, only that specification, which pertains to standardization and appears under the heading: **“Standards, Safety and Training”** in the Tender. In so far as products referred to in Schedules 10 and 47 are concerned, they are governed by condition no. 7.1 under said heading, which being identical read as follows: **“Should be FDA/CE or BIS approved product”**. In so far as product referred to in Schedule 13 is concerned the relevant condition is 7.2, which reads as follows: **“should be FDA/CE approved product”**. For the clarity, we may indicate that FDA refers to the United States Food and Drugs Agency, while CE is certification granted by the European Union. Hereafter for the sake of convenience we will be referring to them as USFDA and CE.

2. It appears that after a pre-bid meeting of the bidders convened by respondent no. 3 on 18.07.2011, corrigendums were issued on 26.07.2011 and 28.07.2011 in respect of the aforementioned conditions qua the products referred to above, which altered the standardization specification requirement exclusively to USFDA. The net result being that in respect of the products in issue, the prospective bidders can submit tenable bids only if the said products have a USFDA Certification/approval. The alternatives provided in the Tender; enabling the bidders to submit bids qua the said

products having an approval from the European Union i.e., CE or, BIS approval, stands deleted. This alteration in the Tender conditions, the petitioner alleges, has been brought about to exclude Indian bidders and/or all such bidders who do not market their products in the USA.

3. In the petition averments have been made in extenso with regard to the credentials of petitioner no. 1 company, which we are informed is a prospective bidder. The petitioner no. 1 company, it is averred, is a product of a joint venture between Schiller A.G., a company based in Switzerland, and the R.R. Group in India. It is averred that petitioner no. 1 company was set up in 1997, with the objective of making available, quality medical equipment in the Indian market. There are averments to the effect that a range of products are offered by petitioner no. 1 company, which extends to critical care, cardiology, radiology, tele-medicine, cardio pulmonary, anesthesia and surgery. There is also a reference to various products, manufactured by petitioner no. 1 company. We need not burden our judgment with the products as none of this is in issue before us.

3.1 Briefly, the petitioner no. 1 goes on to aver that it, not only markets and/or supports products of Schiller A.G., that is, its joint venture partner but, has also set up a manufacturing facility at Puducherry where, it manufactures medical diagnostic equipments, which are complementary to the products of Schiller A.G. products. This apart, it is also averred that, it distributes products of certain other multinationals. It is specifically averred that petitioner no. 1 company is a leading player qua defibrillator and stress test products. It is claimed that it has ISO 9000-2000 as well as ISO 13485-2003, certification for design, manufacture, sale and service of medical equipments.

3.2 In the background of the aforementioned credentials, the petitioner no. 1 company, alludes to the fact that respondent no. 3; which is designated as a National Procurement Support Agency (in short ‘NPSA’), is mandated to invite tenders for various medical institutions and colleges under the Pradhan Mantri Swasthya Suraksha Yojana (in short ‘PMSSY’). It is thus contended that, respondent no. 3 invited the aforementioned Tender under PMSSY whereby, it sought offers, inter alia, in respect of the aforementioned products.

3.3 It is in connection with the Tender that a pre-bid meeting was held by respondent no. 3, on 18.07.2011, at its office at Noida. At this meeting the representatives of the bidders raised various queries and sought clarifications, some of which were accepted, and others clarified. Post the said meeting, first of the impugned corrigendums’ dated 26.07.2011 was issued, whereby as indicated above, the standardized specification was altered so as to include “*approved by only USFDA*”. This corrigendum pertained to the products referred to in several other Schedules as also products referred to in Schedules 10 and 13.

3.4 The petitioner no. 1 company being aggrieved, immediately thereafter, that is, on 28.07.2011 shot off a letter dated 28.07.2011 to respondent no. 3. In this letter, it was broadly conveyed to respondent no. 3, that the amendment in the standardization specification brought about in condition no. 7.1 of schedule 10 had the effect of restricting participation and thus affecting competition. In order to drive home its point, the petitioner no. 1 company adverted to the fact that, its products were IEC and CE certified, and thus, ought to be acceptable. A reference was also made to the fact that, guidelines issued for World Bank funded projects required that, not only should the technical specification be drafted in a transparent manner, but also that, they should be non-restrictive in nature. To buttress

its submission, the petitioner no. 1 company also adverted to the fact that major medical research institutes in India, such as, All India Institute of Medical Sciences (AIIMS), Post Graduate Institute (PGI) and G.B. Pant hospitals were purchasing products, which were either USFDA or CE approved. Examples of sophisticated equipment, such as neonate ventilators supplied to AIIMS and PGI in 2010, which had CE certification, were also given in this communication. A reference was also made to the change in the standardization specification qua the product, referred to in Schedule 13. To highlight the incongruity, a reference was made to the product referred to in Schedule 47; which though more or less similar to the product referred to in Schedule 10, continued to be acceptable with either USFDA or CE approval.

3.5. The result of the aforesaid communication appears to be that respondent no. 3, on 28.07.2011, issued a second corrigendum wherein, the anomaly referred to in the petitioner no. 1 company's letter of 28.7.2011, pertaining to the product referred to in Schedule 47, was apparently corrected, to reflect that, the standardization specification for that product as well would be: "only USFDA". The petitioner no. 1 company, however, persisted with its efforts and towards this end made a second representation dated 30.7.2011, in which, a reference was made to the letters dated 27.7.2011 and 28.07.2011, and also email dated 27.7.2011. It may only be noted that, there is neither on record or, in the list of dates or even in the petition a reference to the email or the letter dated 27.7.2011. In the representation dated 30.7.2011, petitioner no. 1 company reiterated its demand that the original tender conditions should be adhered to by respondent no. 3. This request was followed by yet another letter dated 05.08.2011. The said representation more or less reiterated what had been stated in its letter dated 28.7.2011.

4. Having received no response from respondent no. 3, the petitioners approached this court by way of the captioned writ petition. The writ petition was moved before this court on 23.08.2011, when notice was issued and it was directed that the award of tender, if any, would be subject to the final outcome of the case. The said interim direction was reiterated on 28.09.2011. The petition was admitted on 21.10.2011, when the interim order dated 23.08.2011, was made absolute, during the pendency of the writ petition. Submissions in the case were heard on 30.11.2011 and 01.12.2011. The judgment was reserved on 01.12.2011.

5. Prior to commencement of hearing in the matter, directions were issued to respondents to place on record their respective stands on affidavit. Respondent no. 3, which is the contesting respondent in the case, has filed two affidavits. The first affidavit was filed on 16.09.2011, which was, followed by an additional affidavit dated 09.11.2011. The second affidavit was accompanied by an application seeking indulgence of this court to place on record certain additional documents. It is pertinent to note that the additional affidavit was filed pursuant to the rejoinder filed by the petitioner, on 26.09.2011. We had by an order dated 30.11.2011 allowed the application based on the stand taken by the petitioners that they had no objection to the application being allowed and the additional affidavit being placed on record. The petitioners also chose not to file a rejoinder to the said additional affidavit.

6. Based on the aforesaid state of the pleadings, it would be relevant to outline the stand of respondent no. 3 taken in its first affidavit-in-reply dated 16.09.2011. In this affidavit respondent no. 3 clearly took the following objections in rebuttal:

(i) The writ petition ought to be rejected since it fails to implead a necessary party which, according to respondent no. 3, was the Department of Medical Education and Research, Government of Punjab. In this regard it is averred that Govt. of Punjab was a client of respondent no. 3, as was reflected in the Memorandum of Understanding (MOU) dated 17.08.2010. The respondent no. 3 was thus a consultant, who had undertaken the exercise of purchasing the equipment on behalf of its client.

(ii) Based on the representations made by petitioner no. 1 company the matter was referred to the purchaser which, in this case was the Government Medical College, Amritsar (GMCA), and five senior most specialist in the field, including the Principal of GMCA. The experts in the field deliberated upon the various representations made by petitioner no. 1 company, at a meeting held on 31.07.2011, and thereafter, came to the conclusion that the standard specification for the products referred to in Schedules 10 and 13 should continue to be “**USFDA only**”, whereas the condition for product referred to in Schedule 47 should be modified and amended so as to read as ‘**USFDA only**’ bringing it in line with the product referred to in Schedule no. 10. In this regard a reference was also made to the fact that respondent no. 3 was servicing various clients qua the equipment in question which had a similar standardization specification, i.e., USFDA. By way of example reference was made to the Tamil Nadu Medical Services Corporation Ltd., Chennai; and the Employee State Corporation. Thus the argument raised qua respondent no. 3, of having an ulterior motive in prescribing the impugned standardization specification, was sought to be repelled. In order to buttress its position that there was a deliberation on the issue, a reference was also made to emails dated 31.07.2011, 01.08.2011 and 02.08.2011, exchanged between the representatives of respondent no. 3 and the purchaser, i.e., GMCA.

(iv) Reference was made to clause 9 of the General Instructions Issued To The Bidders (in short GITB), which according to respondent no. 3 permitted the purchaser (i.e., the GMCA) to modify the technical parameters prior to the dead line stipulated in the Tender for submission of bids.

(v) It was averred that under the present Tender a two-bid system was stipulated, which required the bidders to submit their techno-commercial bid and the price bid in two separate envelopes. It was further averred that as per the guidelines contained in the General Financial Rules (in short GFR), a pre-bid conference was held on 18.07.2011, prior to the date stipulated for opening of the techno-commercial bids.

(vi) The impugned modification, in the standardization specification, was brought about pursuant to a 'written order' issued by the purchaser, i.e., GMCA, and after due deliberation with the prospective bidders, at the aforementioned pre-bid conference. The respondent no. 3 went on to aver, that the modification had the approval of an expert body and hence could not be interdicted.

7. The petitioners, however, refuted the stand taken by respondent no. 3, qua the maintainability of the petition on the ground of non-joinder of necessary party as it was neither a party to or, aware of the existence or contents of the MOU dated 17.08.2010. It went on to aver that the turn of events would show that upto the date of the pre-bid meeting and thereafter, the representatives of the purchaser/ GMCA or the government of Punjab had no objection to the standardization specification stipulated in the Tender. The objections, if at all, were of two other bidders present at the pre-bid meeting and, it was only to favour them, that the standardization specifications were altered. It went on to aver that the minutes of the pre-bid meeting dated 18.7.2011, would show that, the suggestion of competing

bidders to amend the standardization specification was deferred till such time a decision in the matter could be taken by GMCA/Government of Punjab. This decision, according to the petitioners, was taken only on 31.7.2011 and “*not on any date prior thereto*”. The suggestion was that, respondent no. 3 on 26.7.2011 had issued a corrigendum on its own, without the say so of its Principal, i.e., GMCA/ Government of Punjab. Therefore, it was contended, that the stand taken in the affidavit dated 16.09.2011, that the corrigendum was issued on the ‘written orders’ of GMCA/ Govt. of Punjab, was incorrect. This, the petitioners sought to establish, by alluding to the fact that respondent no. 3 had placed on record in the first instance only the minutes of the meeting dated 31.7.2011. The oblique suggestion was thus, that the corrigendum dated 26.7.2011 was issued by respondent no. 3 at the behest of two competing bidders. It was further averred that there is no cogent or, reasonable explanation given in the affidavit dated 16.9.2011 whereby, the rationale for changing the standardization specification of the products in issue could be elucidated. The apparent absence of rationale was sought to emphasized by adverting to the fact that, while more critical equipment(s) used in operation theatres; specially those for neonates/ infants, continued to provide for both CE and USFDA certification, a change in the standardization specification for products in issue, which were non-invasive, had been brought about. By way of example it was averred that Tamil Nadu Medical Services Corporation had issued a tender for an identical product in October, 2010, wherein provision for both certificates that is, CE and USFDA was made. Reference is also made to a tender issued on 29.08.2011 by ESIC, Rohini, whereby a similar leeway was given. It was highlighted that the Govt. of Punjab had in July, 2011 issued a tender for defibrillators, wherein again, the standardization specification provided was CE/ USFDA.

8. The respondent no. 3 having been questioned vis-à-vis its stand that the first corrigendum dated 26.7.2011 was not based on ‘written instructions’ of its client, GMCA/Govt. of Punjab, as indicated above, decided to file an additional affidavit dated 9.11.2011. With this affidavit, as noticed above, additional documents were filed. In the additional affidavit a specific averment is made that after the pre-bid meeting of 18.07.2011, a meeting was held on 21.07.2011 in the presence of the nodal officer, one Dr. Jitender Singh, who was also present at the pre-bid meeting of 18.7.2011, under the chairmanship of Dr. S.S. Shergill, Principal GMCA. This meeting evidently was held at 2.00 pm. At the meeting held on 21.7.2011, the issues raised by bidders at the pre-bid meeting held on 18.7.11 were discussed and, thereupon it was resolved that standardization specification in respect of products referred to in Schedule 10 and 13 should be altered to reflect approval by: “USFDA only”; would be acceptable. This, according to respondent no. 3, resulted in corrigendum dated 26.7.2011. Thereafter, on receipt of representation of the petitioner no. 1 company, an expert body once again considered the matter on 31.7.11, when it was resolved that the products referred to in all three schedule, that is, Schedules 10, 13 and 47 would require a USFDA certification.

8.1 The respondent no. 3 in order to buttress its stand that it was only an agent, acting on behalf of its client, that is, GMCA/Government of Punjab adverted to the draft Tender document submitted to the client on 16.5.2011, and the consequent approval received on 22.06.2011, which, according to it, had resulted in the issuance of the Tender, on 07.07.2011.

8.2 It was further submitted that in respect of both, that is, incorporation conditions in the Tender or, their modification, respondent no. 3; (which is a company working under the administrative control of Government of India, Ministry of Health and Family Welfare) was governed by the instructions of

its client – bearing in mind their requirement and/or specifications with regard to the products in issue. Therefore, the examples cited by the petitioners of instances where, standardization specifications had not been altered was of no real significance. It was reiterated that the representations of petitioner no. 1 company, were considered by the client, i.e., GMCA/Government of Punjab at its meeting held on 31.07.2011, and since the petitioners had chosen to assail the decision of its client, i.e., GMCA/ Govt. of Punjab by instituting the present writ petition, a meeting was held on 20.08.2011 by the GMCA, wherein it was resolved to affirm the decision taken at the meeting held on 31.7.2011.

#### Submission of Counsels

9. The arguments in the matter more or less replicated the stands taken in the pleadings filed by the parties. On behalf of the petitioners submissions were advanced by Mr S. Ganesh, Sr. Advocate instructed by Ms Surekha Raman, while on behalf of respondent no. 3 arguments were made by Mr. C.N. Sreekumar.

9.1. Mr Ganesh, learned senior counsel, in his oral submissions, once again, highlighted the fact that the decision to change the standardization specification for the products in issue, was taken at the behest of two competing bidders without the necessary authority of the Principal. Mr Ganesh in order to buttress his submissions adverted to the fact that the minutes of meeting of 31.7.2011 did not advert to the meeting held on 21.7.2011, which would ordinarily have been the position, in the normal course, if such a meeting had been held, as averred by respondent no. 3.

9.2 In support of this submission, a reference was made with regard to the email dated 31.7.2011 issued by the principal, to the representative of respondent no. 3, enclosing therewith the minutes of meeting dated

31.7.2011 wherein, petitioner no. 1 company's representations qua the corrigendums issued was evidently considered.

9.3 It was highlighted that there were two versions of minutes of the meeting dated 31.7.2011 filed by respondent no. 3, along with its counter affidavit of 16.9.2011. The first version of the minutes of meeting dated 31.7.2011 referred only to the product indicated in Schedule 10, and consequently, what was sent by the principal of GMCA to the representative of respondent no. 3, on 31.7.2011, was the said version of the minutes of meeting dated 31.7.2011. According to Mr Ganesh, the second version of the minutes of meeting dated 31.7.2011, appended to the counter affidavit, which referred to the products indicated in all three Schedules, i.e., Schedules 10, 13 and 47; was concocted. It was contended that because the second version of the minutes of the meeting of 31.7.2011 did not exist, in the return mail of 01.8.2011, the representative of respondent no. 3 sought GMCA's decision with respect to products referred to in Schedules 13 and 47. It is because of this, Mr Ganesh contended, that on the very same date by a return mail, a question mark was raised with regard to product referred to in Schedule 47. Therefore, according to Mr Ganesh, the representative of respondent no. 3 by email dated 02.8.2011, drew the attention of GMCA to the last line on page no. 4 of the representation of petitioner no. 1 company vis-à-vis the product referred to in Schedule 47.

9.4. The sum and substance of Mr Ganesh's argument was that, there was firstly, no meeting held by GMCA on 21.7.2011, and that, the version of the minutes of meeting evidently held on 21.7.2011, which was appended with the additional affidavit of 09.11.2011 was forged and fabricated. Secondly, the version of the minutes of meeting of 31.7.2011, wherein, purportedly all three products were discussed was a got up document.

10. Mr Sreekumar, who appeared for the respondent no. 3, drew our attention once again to the contents of minutes of meeting dated 21.7.2011, to establish the fact that it was at the behest of GMCA that the corrigendum dated 26.7.2011 was issued. Mr Sreekumar highlighted the fact that at the end of the day, respondent no.3 was only an agent of its client, and had to thus, strictly, adhere to the instructions issued by its client, i.e., GMCA/ Government of Punjab. The decision, which was taken at the meeting of 31.7.2011 vis-à-vis the amendment of the standardization specification with regard to the products mentioned in Schedule 10, 13 and 47 had been ratified by the Principal, i.e., the GMCA/ Govt. of Punjab. The fact that it was an agent, apart from anything else, was also sought to be demonstrated from the very same emails which were referred to by Mr Ganesh. It was, therefore, contended that any explanation with regard to the veracity of the minutes of the meeting or the purported contradiction in the emails could only be explained by GMCA. It was submitted that despite a specific averment being made as regards the non-maintainability of the writ petition on the ground of failure to implead the necessary party, the petitioners had chosen to neither amend the writ petition nor seek impleadment of its Principal. The power to modify the standardization specifications being available under clause 9 of the GITB of the Tender, the prospective bidders could not be heard to contend that the principal could not alter such standardization specifications. The reasons which propelled the principal, i.e., GMCA to amend the standardization specifications were contained in the minutes of the meeting dated 20.08.2011.

#### Reasons

11. Having heard the learned counsel for the parties and perused the record what has emerged is as follows:

11.1 Respondent no. 3 is a procurement agency, which got appointed as a consultant by the Government of Punjab vide MOU dated 17.08.2010. As per the terms of the said MOU respondent no.3 is, inter alia, obliged to prepare the eligibility criteria for the bidders as also draft the bid documents (See appendix 'A' clause 3) in addition to its duty to procure, supply, install, test and commission, medical equipment as required by the Principal, based on the list of equipment and specifications provided by the client. The relevant clause read as follows:

**“DUTIES OF THE CONSULTANTS**

**DESCRIPTION OF THE SERVICES:**

*The consultant shall undertake the following services*

xxxx

xxxx

*(iii) Preparation of eligibility criteria for bidders and preparation of bid documents*

xxxx

xxxx

*(xii) Procurement, Supply, Installation, Testing and commissioning of Medical Equipments as required by the client based on the list of equipments and specification provided by the client...”*

11.2 The Tender itself proclaims that it was being issued under the PMSSY scheme, for the Government of Punjab, Department of Medical Education and Research, by respondent no. 3. This fact is further borne out on a plain reading of clause 1 appearing in Section I of the Tender which reads as follows:

*“1. Procurement & Consultancy Services Division of HLL Lifecare Limited, for and on behalf of Govt. of Punjab, Department of Medical Education and Research invites sealed tenders, from eligible and qualified tenderers for supply of following medical equipments for Amritsar medical College, Punjab under PMSSY.”* (Emphasis is ours)

11.3 Having regard to the above, we have no doubt that respondent no. 3 was only acting as an agent for procurement of products in issue, on behalf of the Govt. of Punjab, and that, the products in issue were required for use of GMCA. Therefore, the main issue which comes to fore is: whether the present action would fail in the absence of the main protagonist, being a necessary party. It may be pertinent to note that this aspect was squarely put to Sh. Ganesh during the course of hearing held on 30.11.2011. Since the matter was heard in part, Mr Ganesh took time to mull over the matter and return with necessary instructions in that behalf. On resumption of hearing on 01.12.2011, Mr Ganesh indicated that if the court was inclined to implead GMCA, his client would have no objection; however, as advised he would not on his own seek impleadment as he was confident that he would be able to make good his submission even without the presence of GMCA. As a matter of fact a two page synopsis was supplied to us, during the course of arguments on 30.11.2011, by Mr Ganesh. A quick perusal of the synopsis revealed that the minutes of meeting of 31.07.2011 had been assailed on the ground of fraud and fabrication. This aspect prompted the bench to once again ascertain whether the counsel could press allegations of fraud against an entity without it being impleaded and in the absence of necessary pleadings in that behalf. In response to this query, Mr Ganesh wisely took the stand that the petitioners do not seek to press their submission qua fraud. Because this aspect of the matter was not

specifically recorded in the proceeding of 30.11.2011 and 01.12.2011, we thought it important to say so, in our narrative, only to highlight the fact that despite objection taken in this behalf by respondent no. 3, no steps to retrieve the situation were made by the petitioners.

11.4 Therefore, what is required to be seen is whether we should disbelieve the stand of respondent no.3 that a meeting was convened on 21.7.2011 by respondent no. 3's Principal, whereby it was conveyed to respondent no. 3 to amend the standardization specifications. A perusal of the minutes of the pre-bid meeting and the representations received at the said meeting would show that following objections were raised with regard to products referred to in schedules 10 and 13:

***“SCHEDULE 10***

xxxx

xxxx

***Technical Specifications***

xxxx

***7. Standards, Safety and Training***

***7.1 Should be FDA/CE or BIS approved product***

***M/s Phillips & M/s Instromedix – The products should be USFDA and CE/BIS approved.***

***Comments – This is life saving critical equipment and after amending more than 3 reputed vendors are there like zoll, Physiocontrol (Lifepack), Neuonkoda, Philips etc. Hence for amending, college may like to take the decision. USFDA should be considered.”***

***“SCHEDULE 13***

xxxx

xxxx

## *7. Standards, Safety and Training*

### *7.2 Should be FDA or CE approved product*

*M/s Philips – The product should be USFDA and CE approved.*

***Comments – This is life saving critical equipment and after amending, more than 3 reputed vendors are there like Masque, Drager, P B Hamilton & Philips etc. so for amendment, college make like to take the decision. USFDA should be considered.”***

11.5 It is not denied, at this meeting the nodal officer of PMSSY, Dr. Jatinder Singh was present. We have no reason to believe that what transpired at the pre-bid meeting of 18.7.2011 was not conveyed to the Principal, i.e., GMCA. This perhaps resulted in a decision being taken on 21.7.2011, which got conveyed to respondent no. 3, and consequently, led to the issuance of the corrigendum dated 26.7.2011. The fact that this was so, is evident from the extract of the minutes of 21.7.2011. The relevant portions of the minutes are extracted hereinbelow:

*“Minutes of the meeting held on 21/7/2011 to discuss the prebid meeting held on 18/7/2011 in the Office of Principal, Govt. Medical College, Amritsar at 02:00 PM under the Chairmanship of Dr. SS Shergill, Principal.*

*xxxx*

- Dr. Jatinder Singh, Nodal Officer, PMSSY apprised the audience of the outcome of the pre-bid meeting held on 18/7/2011 at HLL Corporate Office, Noida.***
- Vendor specific queries raised at the pre-bid meeting were discussed in light of the original specifications and a note was taken of the resolution of various technical issues as posed by*

*the vendors and issued for comments by HLL Lifecare Limited.*

- *The queries posed by the vendors were resolved and sent as a note for issuance of a corrigendum to the main tender document. This was to be hosted on the websites as mentioned in the original NIT.*
- *The meeting ended with thanks to the Chair.”*

11.6 It is after the first corrigendum was issued on 26.7.2011 that, representations were received from petitioner no. 1 company, wherein the arguments for continuation of approval of both USFDA and CE were put forth and the anomaly with respect to continuation of the standardization specifications, as provided in the Tender, in respect of the product referred to in schedule 47, was adverted to. The fact that this aspect of the matter did not arise at the pre-bid conference of 18.7.2011, is evident from the representations made qua conditions stipulated vis-à-vis various products, none of which adverted to the product referred to in schedule 47.

11.7 The representations of the petitioner no. 1 company, amongst others, dated 28.7.2011 and 30.7.2011 qua the corrigendum of 26.7.2011, were addressed at the meeting dated 31.7.2011. The fact that a meeting was held on 31.7.2011 cannot be disbelieved as minutes to that effect have been generated. What has, however, emerged is that there are two versions of the minutes of meeting dated 31.7.2011. Both versions are appended with the counter affidavit filed by respondent no. 3, on 16.09.2011. The first version is appended at page 707 of the paper book, while the other version is appended at page 710 of the paper book. In the first version, there is a reference to amendment in the standardization specification qua products referred to in all three schedules, i.e., Schedules 10, 13 and 47, while in the second version there is a reference to only that product which finds mention

in Schedule 10. The emails, exchanged between GMCA and respondent no. 3, also highlight this aspect of the matter.

11.8 The point to be noted is that, the first email of 31.7.2011 was sent by the principal of GMCA to the representative of respondent no. 3, and the emails that followed were exchanged between the nodal officer Dr. Jatinder Singh, and the representative of respondent no. 3. As was submitted by Mr Sreekumar, it is quite possible that the committee of experts which deliberated on 31.7.2011, considered the amendments in respect of the product referred to in Schedule 10, in the first instance, based on the representation of the petitioner no. 1 company of 28.7.2011 (as the title to the representation refers to only Schedule 10) and, thereafter, having realized that in the body of the representation reference is also made to products mentioned in Schedule 13 and 47, reconvened and considered the standardization specification with regard to the other two products falling in schedule 13 and 47, and thus, generated the second version of the minutes of the meeting dated 31.07.2011. A perusal of the email dated 31.07.2011 sent by the Principal by itself does not enable one to ascertain as to which version of the minutes was sent; though when read in conjunction with the emails of 01.8.2011 and 02.8.2011 it raises several queries which could best be answered only by GMCA/Government of Punjab had they been impleaded as parties.

11.9 For example, was Dr. Jatinder Singh, the nodal officer present through out the meeting held on 31.07.2011? What time did the meeting commence and end? Who were participants in the meeting? Did they continue, through out the meeting? The answers to these and several other connected issues could only be supplied by GMCA/Government of Punjab had it been impleaded as party and an opportunity given to it to explain the purported gaps in respondent nos 3's explanation of the events. The fact

that the petitioners chose not to implead GMCA/Government of Punjab can only work to their detriment. As a matter of fact we discerned a definite caginess and diffidence on the part of the petitioners to implead GMCA/Government of Punjab in the writ petition despite the court squarely putting the issue in the fore-front.

12. In our view the present action is bound to fail for reason of non-joinder of necessary parties coupled with the fact that there is, admittedly, an absence of concomitant pleadings in that regard. The submission of Mr Ganesh that the court could (if it felt it was necessary) implead the Principal(s), on its own, loses sight of the fact that impleadment of a party without provision of the requisite facts in the pleadings, would be an exercise in futility. The party impleaded would not know the allegation it is called upon to answer. This would have necessarily required an amendment of the pleadings. There is no doubt, in the instant case, given the case set up on behalf of the petitioners, the Principals of respondent no. 3, GMCA/Government of Punjab were a necessary party. The prayer in the writ petition seeks quashing of the two impugned corrigendums. Could this, effective relief, be granted to the petitioners without impleading the Principals? The answer to this, has to be an emphatic no. If this be the position, the writ petition has to fail.

12.1 Mr Ganesh during the course of his submissions responded to this central issue by contending that it was not necessary for the petitioners to implead the Principals of respondent no. 3, since the actions they sought to impugn were entirely of respondent no. 3's own making. This argument has several difficulties. First, as clearly established, respondent no. 3 is undoubtedly acting for and on behalf of GMCA/ Government of Punjab, any order which we issue, on one or the other ground, is bound to impact the Principal(s). Second, any finding affecting the interest of the Principal(s)

without hearing, would be completely in breach of every known principle of natural justice. Third, in any adjudicatory process the court or, for that matter any decision making authority, should be satisfied that its decision meets the test of preponderance of probability. Suspicion, as is often said, cannot be a substitute for proof. This, requires examination of every aspect, of the case. There are many an instance, where matters which appear at first blush, to be open and shut cases, on a closer scrutiny tell a different tale. Therefore, in our view, in the absence of respondent no. 3's Principal, it is not possible to arrive at a conclusion, at which, the learned counsel for petitioner wants us to arrive, that is, at the meeting of 31.07.2011 aspects relating standardization specification of products, falling in all three schedules, i.e., Schedules 10, 13 and 47, were not discussed.

13. In such a scenario we need only look at the decision taken by GMCA at its meeting held on 20.8.2011. At the said meeting, the decision to amend the standardization specification for all products referred to in schedule 10, 13 and 47 was ratified. The reasons given therein are as follows:

***“.....1. The Committee in its meeting dated 31/7/2011 had decided that the prime objective was of ensuring that the best equipment that would meet the requirements of strict standards and dependability during emergencies, should be purchased. (Letter No. 1786-88 dated 31-7-2011).***

***2. Defibrillators and ventilators are life saving equipment which should meet the highest level of specifications and meet the most stringent quality control measures. Only the adherence to these measures would ensure their use in life saving situations during emergencies.***

***3. USFDA Certification is the most accepted and trusted norm the world over in terms of ensuring the quality of life***

*saving machinery and equipment. It is also considered as the gold standard as far as certification of life saving machinery/ equipment is concerned.*

*4. In spite of the fact that other certification agencies may have similar specifications as USFDA approved products but USFDA approved products are more acceptable because of their assurance to quality, previous good experience and the fact that they meet and ensure the highest standards of operability and longevity. These parameters are extremely important when considering life saving machines.*

*The Committee Members were of the considered opinion that since the item in question were life saving they should meet all stringent standards as framed as USFDA. The Committee also decided that no change to the corrigendum to the tender may be made.*

*It was decided to convey the decision to HLL Lifecare, Procurement consultants to the Project....”*

14. In the light of what has emerged, we can only say, given the state of the record presented before us that the irregularity, if any, (which is the best that can be stated at this juncture on behalf of the petitioners) in the meeting held on 31.7.2011 was rectified pursuant to the decision arrived at by GMCA/ Government of Punjab in its meeting held on 20.8.2011. At this meeting GMCA/ Government of Punjab ratified all earlier decisions and, in particular, reiterated its instructions to respondent no. 3 that the products in issue should bear exclusive, a USFDA certification.

15. As indicated hereinabove the petitioner cannot quibble with the fact that the clause 9 of the GITB of the Tender gave the requisite power to

respondent no. 3 to amend/ alter the standardization specifications. There are as a matter of fact no allegations of fraud or fabrication in the writ petition. As noticed hereinabove, submissions made at the bar in this regard were given up by Mr Ganesh. In the absence of any averments in the pleadings with regard to fraud, no further enquiry can be made in the present proceedings.

16. Therefore, having regard to the state of the pleadings and what was urged before us, we are of the view that the present writ petition has to fail. Accordingly, the writ petition is dismissed. We had asked parties to file their bill of costs. Respondent no. 1 and 2 have not filed their bill of costs. The writ petition having been dismissed, the petitioner shall pay to respondent no. 3 costs in the sum of Rs. 3,02,000/-.

**RAJIV SHAKDHER, J**

**SANJAY KISHAN KAUL, J**

**DECEMBER 23, 2011**  
**kk**